

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Revocation  
of the Group Family Daycare License  
of Cathy Kes

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMENDATION**

This matter came on for a contested hearing before Administrative Law Judge Manuel J. Cervantes (ALJ) on July 17, 18, and 19, 2012, at the Scott County Government Center in Shakopee, Minnesota.

Jeanne Andersen, Assistant Scott County Attorney, represents Scott County (County) and the Minnesota Department of Human Services (Department). Christopher J. Perske, Attorney at Law, represents Cathy Kes (Licensee). The record closed upon receipt of the parties' post-hearing submissions, filed August 17, 2012.

**STATEMENT OF ISSUES**

1. Did the Department establish reasonable cause to believe that Licensee was responsible for maltreatment of an infant in her care?<sup>1</sup>
2. Did the Department properly determine that Licensee was disqualified from any further contact with child care program recipients?<sup>2</sup>
3. Did the Department demonstrate reasonable cause to revoke Licensee's child care license?<sup>3</sup>

The Administrative Law Judge recommends that the maltreatment determination be **AFFIRMED**, that Licensee's disqualification be **AFFIRMED**, and that the license revocation of January 20, 2012 be **AFFIRMED**.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

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<sup>1</sup> Minn. Stat. § 626.556. Citations to Minnesota Statutes refer to the 2011 Edition.

<sup>2</sup> Minn. Stat. § 245C.15, subd. 4.

<sup>3</sup> Minn. Stat. § 245A.07.

## FINDINGS OF FACT

1. Licensee has been operating a licensed child care program for approximately eighteen years.<sup>4</sup> She operated under a group family day care license which permitted up to twelve children in the home. She obtained a variance permitting her to care for two infants. This allowed B.B., a three-month-old infant, to attend daycare with his two-year-old brother, who had been in Licensee's care for about a year.<sup>5</sup>

2. B.B. started attending Licensee's program on August, 29, 2011. On September 20, 2011, B.B. was taken to the hospital because the child had what was described as a seizure while in Licensee's care.<sup>6</sup>

3. Licensee indicated that after changing B.B.'s diaper and clothes, she returned him to his car seat. B.B. arched his back and slid out of the unbuckled seat. He went limp, his eyes rolled back into his head, he was unresponsive, and stopped breathing. Licensee called an ambulance. Licensee also called Heather Balk (Balk), B.B.'s mother, and Balk met B.B. and Licensee as they arrived at St. Francis Hospital in Shakopee.<sup>7</sup>

4. Balk called her husband Jake Balk (J.Balk) immediately after Licensee contacted her. It took him over an hour to get to the hospital because he was coming from Hastings. When he arrived at St. Francis Hospital, he found Balk holding B.B. on the bed in a hospital room. She was happy because B.B. was conscious and responsive. Everything appeared fine.<sup>8</sup>

5. Licensee and three nurses were also present. J.Balk testified that when he looked at Licensee, he saw "the fear of God in her eyes. She wasn't crying. Her eyes were red. As soon as I looked at her, I knew something wasn't right. That's what I knew." Shortly thereafter, hospital staff came for B.B. to conduct further testing. Licensee indicated that her son was in the parking lot to pick her up, and she left. J.Balk stated that he doesn't know whether Licensee caused the trauma, but he has a strong feeling that if she didn't do it, she knows who did.<sup>9</sup>

6. Balk reported to medical staff at the hospital that B.B. was well until Saturday, September 18, when he became fussier than normal. On Sunday, she called the nurse help line. She was instructed to pull on B.B.'s ears. B.B. showed some discomfort on the right ear. Later, B.B. was then evaluated at the clinic and was diagnosed with an ear infection. B.B. was prescribed an antibiotic and Tylenol.<sup>10</sup>

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<sup>4</sup> Testimony of Licensee.

<sup>5</sup> Laurie Wolf's Test., Heather Balk's Test., Ex. 33.

<sup>6</sup> Ex. 1., Licensee's Test. Dr. Hudson, the examining doctor from the Midwest Children's Resource Center, preferred "neurologic event" over the word seizure.

<sup>7</sup> *Id.*, Exs. 37, 40.

<sup>8</sup> J.Balk Test.

<sup>9</sup> *Id.*

<sup>10</sup> Exs. 37, 40.

7. B.B. was still taking these medications on September 20. After an initial medical evaluation of bilateral subdural hematoma by a St. Francis physician, the doctor referred B.B. to the Midwest Children's Resource Center (MCRC), Minneapolis Children's Hospital, for an evaluation based on suspected abuse.<sup>11</sup> The Balks were told not to return to Licensee's for child care but to make other arrangements for their older boy with family members for a few days.<sup>12</sup>

8. Dr. Hudson conducted the physical examination of B.B. at MCRC. Dr. Hudson (the Doctor) is a medical doctor and Board Certified Pediatrician. He obtained a sub-specialty of Pediatrics and became a Board Certified Child Abuse Pediatrician after two years of additional training in the medical evaluation of child abuse. The Doctor is employed by the Children's Hospitals and Clinics of Minnesota; Midwest Children's Resource Center and has worked in this field for nine years.<sup>13</sup>

9. Upon examination of B.B., the Doctor found no bruises and the x-rays were negative for fractures. He noted that B.B. was too young to sustain severe accidental trauma on his own without a caregiver being aware. He found no history of trauma to account for the bilateral subdural hematoma. His primary diagnostic consideration was abuse and his primary concern was for the safety of B.B. and the other children, including those in child care.<sup>14</sup>

10. The doctors conferred with the Balks shortly after B.B.'s examination. They indicated that there had been trauma; that B.B. had either been shaken, thrown on the couch or bed; or something of that sort. The doctor then looked directly at J.Balk and said that 75% of the time the father is the one who does this. The doctor indicated that J.Balk was the prime suspect and that he would have to go through an investigatory process. J.Balk was also told that he would not be able to return home to retrieve his older son. J.Balk was hurt upon hearing this. J.Balk broke down emotionally and began to cry. He then became resolved to the fact that the investigation would have to run its course.<sup>15</sup>

11. On September 21, 2011, the County Child Protection Office commenced an investigation. The child protection worker, Jane Callister (Callister), spoke with the treating doctor, Dr. Hudson. The Doctor indicated that there was no medical explanation for B.B.'s brain bruise, or subdural hematomas, and felt that it was likely that maltreatment had occurred. The trauma could have occurred on September 20 when the symptoms presented or up to a week before. He felt that it was possible that B.B.'s injuries may have occurred while at day care.<sup>16</sup>

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<sup>11</sup> Ex. 33.

<sup>12</sup> J.Balk Test.

<sup>13</sup> Dr. Hudson Test.

<sup>14</sup> *Id.*

<sup>15</sup> J.Balk Test.

<sup>16</sup> Exs. 4, 5, 6, and 56.

12. On September 21, 2011, County Detective Carns (Carns) and Callister were in charge of the investigation and conducted the interviews of Balk and J.Balk. Balk indicated that Licensee was stressed because of two crying infants; B.B. and a female infant of about the same age.<sup>17</sup> Licensee seldom held B.B., but preferred to feed him while in his car seat.<sup>18</sup>

13. Balk stated that on September 13, 2011, when she arrived at the end of the day to pick up B.B., she saw Licensee trying to feed B.B. a bottle. Balk noticed that B.B.'s upper lip was puffy and had a purple mark inside the lip. When she asked Licensee how it had happened, Licensee indicated that she had not noticed and it must have just happened.<sup>19</sup> Balk became upset with Licensee's response and considered terminating Licensee's services.<sup>20</sup>

14. Later that evening, J.Balk confirmed the presence of the fat lip when he returned from work at approximately 8 p.m. He calmed Balk down and indicated that accidents can happen. Balk's reply was that Licensee should have known the cause. If it was an accident and B.B. was crying, why didn't Licensee investigate as to the accident and why B.B. was crying? Balk reluctantly returned B.B. to Licensee's care the next day.<sup>21</sup>

15. Balk stated that she had no concerns about her husband or immediate family members causing harm to B.B.<sup>22</sup> Balk and J.Balk stated that J.Balk had little contact with their children. He worked long hours as the supervisor on the reconstruction of the Hastings Bridge. His hours were from 4:30 a.m. to about 8 p.m. Monday through Saturday. J.Balk's contact with his children consisted of a couple of hours at the end of the day and on Sundays. J.Balk had little contact with Licensee. He indicated that he had been to Licensee's for pick up on only five occasions in the past year.<sup>23</sup>

16. Carns characterized the Balks' demeanor as spontaneous and credible. After multiple interviews and polygraph examinations, he concluded that the parents were not involved in the child's trauma.<sup>24</sup>

17. On September 21, 2011, Carns and Callister interviewed Licensee and her adult son Bryan (B.Kes). They were interviewed separately at Licensee's home.<sup>25</sup> Licensee appeared shocked and annoyed that they were there.<sup>26</sup> Licensee stated that B.B. was typically crabby, did not eat well from a bottle, and tended to cry all day. She

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<sup>17</sup> Ex. 57.

<sup>18</sup> Balk Test.

<sup>19</sup> Balk Test., Exs. 36, 57.

<sup>20</sup> Balk Test.

<sup>21</sup> *Id.*

<sup>22</sup> Exs. 36, 57.

<sup>23</sup> *Id.*

<sup>24</sup> Carns Test.

<sup>25</sup> Exs. 36, 57.

<sup>26</sup> Carns Test.

said that it was stressful. When asked about B.B.'s bruised lip, Licensee denied seeing anything unusual with B.B.'s lip the week before<sup>27</sup> and offered no explanation as to how it had happened.<sup>28</sup> At a subsequent interview about a month later, Licensee acknowledged a fat lip and said it may have occurred while B.B. was on his tummy with a pacifier in his mouth.<sup>29</sup>

18. Licensee stated that in an attempt to get B.B. to eat, Licensee had B.Kes attempt to feed B.B. from a bottle on September 20. In a later interview, when Carns asked B.Kes whether he had attempted to feed B.B. from a bottle, B.Kes indicated several times that he couldn't remember if he had. It was only when B.Kes was told that Licensee had told the investigators that she had asked B.Kes to feed B.B. a bottle that B.Kes remembered that he had tried. Carns characterized B.Kes's demeanor as not being forthright, annoyed, and closed.<sup>30</sup>

19. Callister characterized the interviews with the Balks as easy to get information; they spoke openly and with particularized detail. The interview with Licensee was the opposite: it was difficult to get information from Licensee and there were many dead-silent moments between questions.<sup>31</sup>

20. On September 21, 2011, Carns and Callister interviewed Victoria Austin (Austin), B.B.'s maternal grandmother. She had baby-sat B.B. for a short time on Thursday and Friday, September 15 and 16, 2011. Austin indicated that both days were uneventful. B.B. was not fussy either day and drank his bottles almost completely. Austin did not see B.B. hit his head or otherwise sustain any type of injury while in her care.<sup>32</sup>

21. On September 22, 2011, a hospital eye examination confirmed petechiae (retinal hemorrhage) in B.B.'s left eye, which is consistent with physical abuse.<sup>33</sup>

22. On September 22, 2011, Licensee was issued an Order of Temporary Immediate Suspension (TIS) and Licensee has not provided licensed day care since that time.<sup>34</sup>

23. On October 7, 2012, several of the children in Licensee's program were interviewed by County Detective Ryan and Callister. The children indicated that the two infants cried throughout the day at Licensee's program.<sup>35</sup>

24. One child stated that Licensee gets really mad when the babies cry. And that the Licensee makes a "gorilla face", a mad face, and yells at kids who wet their

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<sup>27</sup> Callister's Test.

<sup>28</sup> *Id.*, Exs. 36, 57.

<sup>29</sup> Kes Test., Callister Test.

<sup>30</sup> *Id.*, Exs. 36, 57.

<sup>31</sup> Callister Test.

<sup>32</sup> *Id.*, Ex. 57.

<sup>33</sup> Ex. 34.

<sup>34</sup> Exs. 7, 8.

<sup>35</sup> Exs. 41, 42.

pants. At that point in the interview, the child's parents, who were in another room within earshot, came into the room and the conversation ended shortly thereafter. The child went off to play in her room. The child's father, Karl Pint, is Licensee's nephew. Both parents attempted to discredit what the child had said by indicating to the investigators that their child tends to make up things and has a vivid imagination.<sup>36</sup>

25. On October 20, 2011, Carns interviewed B.Kes, by telephone. B.Kes again denied attempting to feed B.B. on September 20, 2011. B.Kes also stated that he had picked up his mother from St. Francis Hospital on September 20 about forty-five minutes after she had left for the hospital in the ambulance. On the way home, Licensee told B.Kes that hospital doctors had suspected shaken baby syndrome.<sup>37</sup>

26. On October 21, 2011, Licensee voluntarily submitted to a polygraph examination.<sup>38</sup> This was administered by a Bureau of Criminal Apprehension examiner. At the hearing, over Licensee's objection, the ALJ received the evidence related to Licensee's polygraph examination into the record. The ALJ did not consider any of the evidence relating to Licensee's polygraph examination.<sup>39</sup>

27. On October 27, 2011, Detective Carns received a telephone call from Licensee. She indicated that she had heard that J.Balk was currently having suicidal thoughts and had been consuming more alcohol than usual. She also said that B.B.'s two-year-old brother may have been putting B.B. in a bouncy chair, insinuating that he could have hurt B.B. Detective Carns interviewed J.Balk the next day. Detective Carns gave little weight to Licensee's allegations.<sup>40</sup>

28. On October 27, 2011, Callister, using a preponderance of the evidence standard, concluded that B.B. was maltreated and that the maltreatment occurred while under Licensee's care. She based that determination on the following factors:

- that B.B. sustained an injury that could not be explained as an accident or medical condition;
- the Doctor's medical opinion that B.B.'s condition was non-accidental;
- the consistent and detailed interviews of the Balks and the lack of forthright interviews with Licensee;
- apparent seizure on September 20, 2011;
- the swollen lip and bruise mark which B.B. sustained on September 13, 2011;

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<sup>36</sup> Callister and H. Pint Test., Ex. 42.

<sup>37</sup> Ex. 44.

<sup>38</sup> Ex. 47.

<sup>39</sup> In this ALJ's view, a polygraph examination is not reliable and does not meet the evidence standard established in Minn. R. 1400.7300, subp. 1.

<sup>40</sup> Ex. 48.

- discrepancies in information provided through different interviews regarding the swollen lip and B.Kes's attempted feeding; and
- reports from child interviews which indicated that the two babies cried all day which caused Licensee to yell and to be upset.<sup>41</sup>

29. On October 27, 2011, the Child Protection Office concluded their investigation. It found that Licensee was responsible for serious maltreatment of a minor, she was disqualified from providing child care, and from having contact with licensed program participants.<sup>42</sup>

30. The Scott County Sheriff's Office ended their investigation in December 2011. Detective Carns concluded that Licensee was somehow responsible for the abuse of B.B. based on his professional opinion and experience in conducting investigations. He based his opinion on Licensee's demeanor, lack of being forthright, her willingness to participate, at times, in the investigation and not participate at other times, and her attempt to deflect fault on B.B.'s family.<sup>43</sup>

31. The County recommended that Licensee's child care license be revoked and on January 20, 2012, the Department issued its Order of Revocation.<sup>44</sup>

32. The Respondent made a timely request for a contested hearing.<sup>45</sup>

33. At the hearing, the Doctor indicated that the infant had to have sustained a significant trauma to cause a bilateral subdural hematoma. As a three month old, there is not too much that B.B. could have done to cause himself injury; so if a significant trauma occurred, a caregiver would have known. In this case no one reported any trauma. Medical tests were conducted and the results ruled out other medical reasons for the subdural hematomas. The hospital conducted coagulation studies which were negative for a bleeding disorder. In addition, B.B. was circumcised at birth and no disorder was presented.<sup>46</sup>

34. The Doctor explained that subdural hematomas in children are often caused by quick acceleration or deceleration of the head while the brain within the skull continues to move. This action tears the bridging veins which drain blood between the brain and skull, causing bleeding. A fall by a small child from a counter top height would not likely cause this type of injury. Violent force is necessary. The Doctor described violent force as enough force that anyone witnessing a baby being shaken that it would raise the level of concern in the observer that the child would be injured or killed. Once a child has sustained this type of injury, a child may become symptomatic on a

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<sup>41</sup> Callister Test., Ex. 61.

<sup>42</sup> Exs. 16, 24.

<sup>43</sup> Carns Test.

<sup>44</sup> Ex. 24.

<sup>45</sup> Ex. 29.

<sup>46</sup> Hudson Test.

continuum of crying, becoming sleepy, unresponsiveness, unconsciousness, lack of breathing, or dying.<sup>47</sup>

35. The Doctor testified that B.B. had findings of multiple retinal hemorrhages of the left eye. His right eye was normal. Retinal hemorrhages result from significant trauma and are often associated with abusive trauma. This condition coupled with the subdural hematomas raise a greater concern that severe trauma was inflicted.<sup>48</sup>

36. The Doctor described the color of the blood on a CT scan; generally, new blood appears white and old blood appears black. He stated that B.B.'s images showed relatively new fluid that appeared days before the images were taken. Another consideration was B.B.'s symptoms. The Doctor indicated some acute neurological symptoms occurred to B.B. that brought him to the hospital on September 20, but he did not have a definitive opinion that significant trauma occurred on that day. B.B. had other symptoms days before, including an ear ache. The Doctor stated that B.B.'s images supported the hypothesis of both new and old injuries. He indicated that the data from studies of confessed abusers showed that when these children were diagnosed, the data showed that the children had experienced multiple episodes of abuse.<sup>49</sup>

37. Once there has been a subdural hematoma, there can be subsequent or repeat bleeding. The Doctor did not find it clinically significant that new bleeding was found at B.B.'s subsequent check-ups because B.B. was not presenting any symptoms and there was no radiographic evidence of new brain injury. The Doctor described the new bleeding as likely related to the re-healing of a clot and neovascularization; the generation of new vessels. He did not believe the subsequent re-bleeding would have been caused by severe trauma.<sup>50</sup>

38. The Doctor reached a conclusion that

- severe physical abuse occurred based on the age of the child and that he could not have hurt himself;
- there was no report of trauma to B.B.;
- the extent of injury to B.B., he had subdural hematomas on both sides of the brain and moderate to significant hemorrhages in the left eye, suggesting severe trauma; and
- there were no underlying medical causes of B.B.'s condition.<sup>51</sup>

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<sup>47</sup> *Id.*, Ex. 33.

<sup>48</sup> Hudson Test, Ex. 34.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*, Ex. 35.

<sup>51</sup> Hudson Test.



39. Licensee sought a second medical opinion from Dr. Ford. Dr. Ford obtained his medical degree from Baylor College of Medicine and completed a radiology residency at the University of Minnesota. He is a Board Certified Radiologist and sub-certified in Neuroradiology. He is currently self-employed in private practice, is a member of a clinic group at a community hospital in Florida, and has been practicing in radiology for twenty-five years.<sup>52</sup>

40. Dr. Ford indicated in his review of B.B.'s CT and MRI scans that B.B. has a prominent arachnoidal space. The arachnoid space is the space between the skull and brain. Dr. Ford felt that the larger arachnoid space may make B.B. more susceptible to spontaneous bleeding or accidental injury. Dr. Ford acknowledged that he did not examine B.B., review the collateral information, or speak to the parents or any other persons related to this matter.<sup>53</sup>

41. Like Dr. Hudson, Dr. Ford noted that the blood shown on the September 23, 2011 scans appeared to show different stages of blood collection. Dr. Ford characterized it as subacute [fresh] as well as acute [intermediate] and probably chronic [old] subdural blood, ranging in time from seven to ten days. Like Dr. Hudson, he indicated that subdural hemorrhages beget more hemorrhages. Once you have had one, there is susceptibility for more hemorrhages. The subdural bleeding re-accumulated as seen on a February 2012 study, but had cleared by the May 19, 2012 CT scan.<sup>54</sup>

42. Dr. Ford stated that bilateral retinal hemorrhages are seen more often in abusive head injury and unilateral retinal hemorrhage can be seen in children with accidental head injury. He felt that such a distinction may be useful to distinguish between accidental from abusive head trauma in children less than 24 months of age. Dr. Ford, however, was not provided the actual retinal examination so he had no insight as to the timing of the petechial hemorrhage or the distribution of the hemorrhage.<sup>55</sup>

43. Dr. Ford could not rule out the possibility of abusive head trauma but thought additional correlation with the timing of the provision of day care services and the nature of the retinal hemorrhage would have been helpful.<sup>56</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. Minnesota law gives the Administrative Law Judge and the Commissioner authority to conduct this contested case proceeding and to make findings, conclusions, and recommendations.<sup>57</sup>

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<sup>52</sup> Ford Test.

<sup>53</sup> *Id.*, Ex. D.

<sup>54</sup> *Id.*

<sup>55</sup> Ex. D.

<sup>56</sup> *Id.*

2. The Department gave proper and timely notice of the hearing in this matter and has complied with all procedural requirements.

3. Minn. Stat. § 245A.07, subd. 1(a), reads:

In addition to making a license conditional under section 245A.06, the commissioner may suspend or revoke the license, impose a fine, or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule. When applying sanctions authorized under this section, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.

4. Minn. Stat. § 245A.07, subd. 3(a), in relevant part, reads:

The commissioner may suspend or revoke a license, or impose a fine if a license holder fails to comply fully with applicable laws or rules, if a license holder... has a disqualification which has not been set aside under section 245C.22, or if a license holder knowingly withholds relevant information from or gives false or misleading information to the commissioner... during an investigation, or regarding compliance with applicable laws or rules.

5. Licensee violated Minn. Stat. § 245A.07, subd. 3(a) by withholding information relevant to the maltreatment investigation.

6. Minn. Stat. § 245A.08, subd. 3(a), reads,

At a hearing regarding a licensing sanction under section 245A.07, including consolidated hearings under subdivision 2a, the commissioner may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the commissioner demonstrates that reasonable cause existed, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the commissioner alleges the license holder violated, at the time that the commissioner alleges the violations of law or rules occurred.

7. Minn. Stat. § 245A.04, in relevant part, reads,

Subdivision 6. Before issuing, denying, suspending, revoking, or making conditional a license, the commissioner shall evaluate information gathered under this section. The commissioner's evaluation shall consider facts, conditions, or circumstances concerning the program's operation,

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<sup>57</sup> Minn. Stat. §§ 14.50, 14.69, and 245A.07, subd. 3.

the well-being of persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed by the applicant or license holder.

Subdivision 7 (e), in relevant part, reads, the commissioner shall not issue or reissue a license if the applicant, license holder, or controlling individual has:

(1) been disqualified and the disqualification was not set aside and no variance has been granted....

8. Minn. Stat. § 626.556, subd. 2 in relevant part, reads,

As used in this section, the following terms have the meanings given them unless the specific content indicates otherwise:

(g) "Physical abuse" means any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries....

9. Minn. Stat. 245C.02, subd. 18(a), reads,

"Serious maltreatment" means sexual abuse, maltreatment resulting in death, neglect resulting in serious injury which reasonably requires the care of a physician whether or not the care of a physician was sought, or abuse resulting in serious injury.

10. Minn. Stat. § 245C.14, subd. 1(a), reads,

The commissioner shall disqualify an individual who is the subject of a background study from any position allowing direct contact with persons receiving services from the license holder or entity identified in section 245C.03, upon receipt of information showing, or when a background study completed under this chapter shows any of the following:

(1) a conviction of, admission to, or Alford plea to one or more crimes listed in section 245C.15, regardless of whether the conviction or admission is a felony, gross misdemeanor, or misdemeanor level crime;

(2) a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition of any of the crimes listed in section 245C.15, regardless of whether the preponderance of the evidence is for a felony, gross misdemeanor, or misdemeanor level crime; or

(3) an investigation results in an administrative determination listed under section 245C.15, subdivision 4, paragraph (b).

11. Subd. 2 (a). If an individual who is studied under section 245C.03, subdivision 1, paragraph (a), clauses (2), (5), and (6), is disqualified from direct contact under subdivision 1, the commissioner shall also disqualify the individual from access to a person receiving services from the license holder.

12. Subd. 2 (b) No individual who is disqualified following a background study under section 245C.03, subdivision 1, paragraph (a), clauses (2), (5), and (6), or as provided elsewhere in statute who is disqualified as a result of this section, may be allowed access to persons served by the program unless the commissioner has provided written notice under section 245C.17 stating that:

(1) the individual may remain in direct contact during the period in which the individual may request reconsideration as provided in section 245C.21, subdivision 2;

(2) the commissioner has set aside the individual's disqualification for that licensed program or entity identified in section 245C.03 as provided in section 245C.22, subdivision 4; or

(3) the license holder has been granted a variance for the disqualified individual under section 245C.30.

13. Minn. R. part 9502.0325, subp. 1, reads,<sup>58</sup>

The purpose of parts 9502.0315 to 9502.0445 is to establish procedures and standards for licensing family day care and group family day care homes to ensure that minimum levels of care and service are given and the protection, proper care, health, safety, and development of the children are assured.

14. Minn. R. part 9502.0335, subp.6, reads,

An applicant or provider shall not be issued a license or the license shall be revoked, not renewed, or suspended if the applicant, provider, or any other person living in the day care residence or present during the hours children are in care, or working with children:

D. Has a disqualification under Minnesota Statutes, section 245C.15, that is not set aside under Minnesota Statutes, section 245C.22, or for which a variance has not been granted under Minnesota Statutes, section 245C.30.

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<sup>58</sup> Citations to Minnesota Rules refer to the 2010 Edition.

15. The Department established by a preponderance of the evidence that physical maltreatment occurred while B.B. was in Licensee's care. The Department's disqualification was appropriate.

16. The Department has established reasonable cause to revoke Licensee's day care license. Licensee did not carry her burden of proof by a preponderance of the evidence that she was fully compliant with applicable Minnesota law.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the Commissioner **AFFIRM** the January 20, 2012 Order of Revocation.

Dated: November 13, 2012

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MANUEL J. CERVANTES  
Administrative Law Judge

Reported: Digital Recorded  
No transcript prepared

### **NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Lucinda Jesson, Commissioner, Department of Human Services, and P.O. Box 64998, St. Paul, MN 55164-0998, 651-296-2701 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve her final decision upon each party and the Administrative Law Judge by first class mail.

## **MEMORANDUM**

The Department brought this revocation action against Licensee's child care license based on the medical investigation of Dr. Hudson and after a thorough investigation by the Scott County Sheriff and Child Protection Offices. The Department adopted the Child Protection Office's conclusion that physical abuse maltreatment of B.B. occurred on or about September 20, 2011, and that Licensee was responsible for it. The ALJ agrees with the Department's determination and concludes that it has met its burden of proof by a preponderance of the evidence that Licensee was responsible for B.B.'s maltreatment. Given that conclusion, the Department's disqualification was appropriate and should be affirmed.

Licensee raised a medical issue of whether the injury was spontaneous or accidental rather than from abuse. She offered the testimony and report of Dr. Ford. Dr. Ford opined that B.B.'s hematomas occurred because of an enlarged arachnoidal space. Infants with this condition have a greater propensity to bleed spontaneously or with a relatively minor accident.

B.B. had retinal hemorrhages in only one eye and Dr. Ford opined that bilateral hemorrhages are more often seen in abusive head injuries. Dr. Ford acknowledged however that he was not provided with the actual retinal examination so he was not aware of the timing or distribution of the petechial hemorrhage.

Dr. Ford did not have the benefit of the communications with B.B.'s parents or the actual retinal examination. He said that additional information relative to the timing of daycare and the nature of the retinal hemorrhage would have been helpful. Given the information he reviewed, Dr. Ford could not rule out the possibility of abuse.

In contrast, Dr. Hudson had the retinal examination and the benefit of contact with the parents and others involved in the abuse investigation. With his specialized training and over nine years of experience in this field, Dr. Hudson has developed an expertise in evaluating abusive trauma. Dr. Hudson examined B.B., reviewed B.B.'s medical history, and excluded other potential causes or medical conditions to explain B.B.'s hematomas and retinal hemorrhages. Given all the information presented, Dr. Hudson opined that B.B. had sustained abuse and that it may have occurred while he was in Licensee's care. The ALJ accepts the medical opinion of Dr. Hudson.

Initially, J.Balk was the prime suspect of the abuse. Statistically, the father of an abused child commits the abuse 75% of the time. The Child Protection and Sheriff's investigators conducted interviews of persons who had recent contact with B.B. and had multiple interviews with J.Balk. The Sheriff's investigator characterized the Balk's statements as spontaneous, forthright, and consistent.

In contrast, Licensee's interviews were the opposite. She appeared annoyed, she was not spontaneous, was less than forthright, appearing to know more than she was willing to say, and her statements relative to B.B.'s bruised lip were inconsistent. There was a feeling that if she didn't abuse B.B., she knew how it happened.

Minnesota law permits the revocation, or other licensing sanction, if a license holder knowingly withholds relevant information or gives false or misleading information during an investigation.

As for Licensee's son, he was less than honest as to his involvement in attempting to feed B.B. on September 20, the date of the neurologic event. Her son was untruthful in both of his interviews.

Based on the multiple interviews of the Balks, their extended family, Licensee and her son, the Child Protection investigator concluded that the Balks and their extended family were more credible than Licensee and her son. The ALJ accepts the credibility findings of the investigators.

Based on their investigation, the Child Protection and Sheriff's investigators excluded the Balks and their extended family from having committed the abuse. The Child Protection investigator concluded that B.B. was maltreated and that the maltreatment occurred while under Licensee's care. The Sheriff's investigator concluded that Licensee was somehow responsible for the abuse of B.B. based on his professional opinion in doing investigations.

Based on the entire record including the honest statements of the Balks, the less than candid statements of Licensee and her son, and the medical evidence, the ALJ finds that the Department has established by a preponderance of evidence that B.B. sustained physical abuse maltreatment and that it occurred while B.B. was in her care. The ALJ recommends that the Commissioner affirm the Department's maltreatment finding, affirm Licensee's disqualification, and that the Department's revocation action be affirmed.

**M. J. C.**